

PP v. KA LIAN LOGISTICS SDN BHD & ORS
HIGH COURT SABAH & SARAWAK, KOTA KINABALU
NURCHAYA ARSHAD J
[CRIMINAL APPLICATION NO: BKI-44-12-9-2017]
25 JANUARY 2018

CUSTOMS AND EXCISE: *Forfeiture – Customs evasion – Seizure of vehicles allegedly used for illegal transportation of unpaid duty beers – Predicate offence under s. 135(1)(a) of Customs Act 1967 – Whether connected to seized vehicles – Whether vehicles proceeds of illegal activities – Whether seizure of vehicles mala fide – Whether vehicles subject matter relating to commission of offence under s. 4(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether application to cause notice to third parties to be published in Gazette ought to be allowed*

CRIMINAL PROCEDURE: *Forfeiture – Customs and excise – Customs evasion – Seizure of vehicles allegedly used for illegal transportation of unpaid duty beers – Predicate offence under s. 135(1)(a) of Customs Act 1967 – Whether connected to seized vehicles – Whether vehicles proceeds of illegal activities – Whether seizure of vehicles mala fide – Whether vehicles subject matter relating to commission of offence under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether application to cause notice to third parties to be published in Gazette ought to be allowed*

This was an application by the prosecution to cause a notice to parties to be published in the *Gazette* and subsequently to forfeit seven vehicles that were allegedly used for illegal transportation of several unpaid duty beers. This was a case relating to customs tax evasion by the respondent. It involved 31 containers containing beers amounting to RM1,658,545.88 without import license which was an offence under s. 135(1)(a) of the Customs Act 1967 ('Customs Act'). Further investigation also led to further discovery of smuggling of containers. The company's assets were seized as a result, of which the first respondent had obtained and used the said vehicles in a legal manner without any intention or apparent act in its business transaction to unlawful dealings. The issues that arose were (i) whether the seven vehicles seized were the subject matter relating to the commission of an offence under s. 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFA'); and (ii) whether the applicant's application to cause a notice to third parties to be published in the *Gazette* should be allowed.

Held (dismissing notice of motion):

- (1) The law clearly required the applicant to prove that the vehicles are proceeds of illegal activities. The illegal activity in question was related to the predicate offence under s. 135(1)(a) of the Customs Act. The

- A owner of the goods was Everich Resources Sdn Bhd and Eagle Import & Export Sdn Bhd. The first respondent was paid by the owner of goods to deliver the goods to a destination. By right, the owner of the goods was the one who would have to declare, apply out of port and comply with the shipping procedures. The first respondent was merely
- B delivering the said goods to the owner of the goods. All the containers were sealed by the supplier and there was no way that the first respondent would know/could check whether it was against the business procedures/the law. (paras 13 & 14)
- (2) The offence allegedly took place in February 2016 but in September, the
- C customs came to the first respondent's office and seized their assets. Thus, there was nothing to connect the predicate offence to the seized vehicles, as the first respondent was doing an entirely different business from what the prosecution alleged. The first respondent was paid to deliver the goods. It was not their duty to ensure all the papers were in
- D order. It was the consignee's papers that should be in order which was reflected in this case as the goods that had been taken out from the port itself. The transaction was cleared, and that meant the papers were all in order. Therefore, to come and seize the first respondent's assets later in the year, for an offence committed by someone else, was in fact *mala fide*. (paras 15 & 16)
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- (3) The vehicles seized from the first respondent were not proven to be the
- F subject-matter relating to the commission of an offence under s. 4(1) of the AMLATFA or proceeds of an unlawful activity (offence under s. 135(1)(a) of the Customs Act). Thus, since the vehicles seized were not proven or even related to the commission of an offence under s. 4(1), the applicant's application for notice to third parties to be published in the *Gazette* was not allowed. (paras 18 & 19)

Legislation referred to:

Customs Act 1967, s. 135(1)(a)

- G Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001, ss. 2(1), 4(1)(a), (b), 56(1)

For the appellant - Nik Haslinie Hashim; DPP

For the respondent - Hairul Vaiyron; M/s Hairul Vaiyron & Co

- H [Editor's Note: Anti-Money Laundering, Anti-Terrorism Financing Act 2001 has been amended to Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001.]

Reported by Suhainah Wahiduddin

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JUDGMENT

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Nurchaya Arshad J:**Brief Facts**

[1] This is an application by the prosecution to cause a notice to third parties to be published in the *Gazette* and subsequently to forfeit:

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(i) Prime mover lorry made by Beiben Model CWT2540SZ-v3.345 year 2013 with registration number SAB9732P belonging to the first respondent.

(ii) Prime mover lorry made by Nissan Model CW631G (RB/AA) year 2007 with registration number SS4111k belonging to the first respondent.

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(iii) Prime mover lorry made by Nissan Model CK481 (RB/JE290) year 2011 with registration number SAB1809E belonging to the first respondent.

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(iv) Prime mover lorry made by Nissan Model GK4(RB/HIR P02) year 2015 with registration number SAB5390Y belonging to the first respondent.

(v) Prime mover lorry made by ERF Model ERF EC11 year 2001 with registration number SAA119J belonging to the first respondent.

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(vi) Prime mover lorry made by Nissan Model CW631GNT(RB/LA042) year 2007 with registration number SAA1578R belonging to the first respondent.

(vii) Prime mover lorry made by Nissan Model CW610GNT TRACTOR HEAD year 1998 with registration number SAA6979E belonging to the first respondent.

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[2] Briefly, this case relates to customs tax evasion by the respondent. It involves 31 containers containing beers amounting to RM1,658,545.88 without import license which is an offence under s. 135(1)(a) of the Customs Act 1967. Further investigation also led to further discovery of smuggling of containers. The company's assets were seized as a result, of which the first respondent has obtained and used the said vehicles in a legal manner without any intention or apparent act in its business transaction to unlawful dealings.

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The Law

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[3] Section 56(1) of the AMLATFA under which the application for the forfeiture of the respondents' monies in various bank accounts is made is reproduced herein for easy reference:

[4] Forfeiture of property where there is no prosecution;

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56. (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure,

- A or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is:
- (a) **the subject-matter or evidence relating to the commission of such offence;**
- B (b) **terrorist property;**
- (c) **the proceeds of an unlawful activity; or**
- (d) **the instrumentalities of an offence.**
- (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:
- C (a) that the property is:
- (i) **the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;**
- D (ii) **terrorist property;**
- (iii) **the proceeds of an unlawful activity; or**
- (iv) **the instrumentalities of an offence; and**
- (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
- E (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
- F (4) In determining whether the property is:
- (a) **the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;**
- (b) **terrorist property;**
- (c) **the proceeds of an unlawful activity; or**
- G (d) **the instrumentalities of an offence,**
- the court shall apply the standard of proof required in civil proceedings.**
(emphasis added)
- H [5] This section gives the power to the Public Prosecutor to apply for forfeiture of property in respect of which there is no prosecution for an offence under s. 4(1) and the power of a judge of the High Court to make an order for the forfeiture of such property.
- I [6] It is also the interpretation of s. 56(1), that the property which is subject to a forfeiture order must be the property seized under the AMLATFPUAA and that there is no prosecution or conviction for an offence under s. 4(1).

[7] It is the requirement of the section that such application must be made before the expiration of 12 months from the date of the seizure of the property in question, or where there is a freezing order, 12 months from the date of the freezing, failing which the property shall be released to the person from whom it was seized. This condition was also fulfilled by the prosecution as the application was made on 29 September 2017 while the so-called 'seizure' was executed on 29 September 2016 and clearly within the time frame specified under s. 56(1).

[8] Since the requirements have been met, the properties which are the subject matter of or evidence relating to the commission of the offence under s. 4(1) MUST be satisfied before the prosecution can make the application.

[9] The AMLATFPUAA by virtue of s. 2(1) applies *inter alia*, to any serious offence or unlawful activity. The respondent's case is that the seven vehicles seized were in connection with an offence under s. 4(1)(a) and s. 4(1)(b) which reads:

Offence of money laundering;

4. (1) Any person who

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

(emphasis added)

Issues

Whether The Seven Vehicles Seized Are The Subject Matter Relating To The Commission Of An Offence Under S. 4(1) Of The AMLATFPUAA

[10] In this case, the consignee was Everich Resources Sdn Bhd and Kinabalu Eagle Import & Export Sdn Bhd. They are the owners of the goods inside the containers dragged by the first respondent's prime movers. The consignee's application was approved and released by the customs department and port management. The first respondent then delivered the containers that were cleared from the port to the destination as required.

[11] The first respondent was only paid to deliver its services (similar like a courier service). As for the consignee, it is their job to get the clearance of the containers from the port authorities and other relevant authorities ie, customs department. In the event that there were any problems with the clearance, the containers will not be released.

- A [12] In this application, the applicant has to prove its case on a balance of probabilities. The predicate offence must be proved first before proving the offence under s. 4(1) of the AMLATFA. Only then the court could proceed to consider s. 56 of the AMLATFA. It is a requirement that the offence must be proved before the court makes the forfeiture order.
- B [13] The law is very clear to require the applicant to prove that the vehicles are proceeds of illegal activities. The illegal activity in question relates to the predicate offence under s. 135(1)(a) of the Customs Act. The failure to do so would mean that they have not proven the predicate offence and subsequently the offence under s. 4(1).
- C [14] The owners of the goods are Everich Resources Sdn Bhd and Eagle Import & Export Sdn Bhd. The first respondent is paid by the owners of goods to deliver the goods to a destination. By right, the owners of goods are the ones who will have to declare, apply out of port, comply with shipping procedures, etc. The first respondent is just merely delivering the said goods to the owner of the goods (similar like courier service ie, Poslaju). All containers are sealed by the supplier and there is no way that the first respondent will know/can check whether it is against business procedures/ the law. I just find the whole process 'suspicious' because the port management and the customs cleared the consignee's application in the first place and subsequently the goods were taken out of the port. However, seven months later, the customs department came to their office with documentations alleging that the said vehicles were used for illegal transportation of several unpaid duty beers. If there were suspicion or allegation in the first place, why didn't the customs stop them while they were in the port? Why was there a clearance? Who gave the clearance?
- F [15] Secondly, the offence took place in February 2016 but in September, the customs came to the first respondent's office and seized their assets.
- G [16] Here, I find there is nothing to connect the predicate offence to the seized vehicles, as the first respondent is doing an entirely different business from what the prosecution alleged. The first respondent was paid to deliver the goods. It is not their duty to ensure all the papers are in order. It was the consignee's papers that should be in order which was reflected in this case as the goods have been taken out from the port itself. The transaction was cleared, meaning the papers are in order. Therefore, to come and seize first respondent's assets later in the year for an offence committed by someone else is in fact *mala fide*.
- H [17] I also do not agree with the prosecution that the vehicles are said to be proceeds from illegal activities as those vehicles were bought way back before the allegation started and on top of it, all the vehicles are financed by
- I the bank.

[18] That being so, the vehicles seized from the first respondent are not proven to be the subject-matter relating to the commission of an offence under sub-s. 4(1) of the Act or proceeds of an unlawful activity (offence under s. 135(1)(a) of the Customs Act).

Whether Applicant's Application To Cause A Notice To Third Parties To Be Published In The Gazette Should Be Allowed

[19] Since the vehicles seized were not proven or even related to the commission of an offence under s. 4(1) of the Act, applicant's application for notice to third parties to be published in the *Gazette* is not allowed.

[20] After reading all the affidavits, submissions by both parties and evidence attached therein, I therefore dismissed notice of motion dated 26 September 2017 with no order as to costs.

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